IDAHO NATURAL RESOURCES
LEGAL FOUNDATION

IBLA 85-527 Decided August 28, 1985

Appeal from a decision of the State Director, Idaho State Office, Bureau of Land Management, authorizing use of herbicides to control noxious weeds on public range lands and finding no significant environmental impact.

Vacated and remanded.

1. Environmental Quality: Environmental Statements -- Environmental Quality: Herbicides -- National Environmental Policy Act of 1969: Environmental Statements

   Where review of the environmental consequences of a proposed action discloses gaps in relevant information or scientific uncertainty, the gaps or uncertainty must be disclosed. If the information relative to adverse impacts is essential to a reasoned choice among alternatives and the cost of obtaining it is exorbitant, the agency shall weigh the need for the action against the risk and severity of possible adverse impacts. Such consideration shall include a worst case analysis and an indication of the probability or improbability of its occurrence.

2. Environmental Quality: Environmental Statements -- Environmental Quality: Herbicides -- National Environmental Policy Act of 1969: Environmental Statements

   The presence of gaps in information regarding the adverse effects of a herbicide on the human environment may stem from lack of knowledge as well as from a dispute among experts regarding the inferences to be drawn from existing information.

3. Environmental Quality: Environmental Statements -- Environmental Quality: Herbicides -- National Environmental Policy Act of 1969: Environmental Statements

   Federal action within the meaning of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4361 (1982), may be found not only where an agency proposes to undertake an action itself, but also where an agency

> makes a decision which permits action by another party. Ordinarily some overt act by a federal agency in support of another party's action is required to establish federal action. Federal action may be found where there is federal funding as well as federal approval of action conducted by state and local authorities on the public domain.

APPEARANCES: Edwin W. Stockly, Esq., Boise, Idaho, for appellant; John F. Varin, Esq., Special Deputy Attorney General, State of Idaho, for intervenors; Robert S. Burr, Esq., and Allan D. Brock, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The Idaho Natural Resources Legal Foundation has appealed from a decision of the State Director, Idaho State Office, Bureau of Land Management (BLM), dated February 22, 1985, authorizing the control of noxious weeds on public range lands by means of ground and aerial herbicide spraying in addition to manual, mechanical, and biological control methods, and finding that no significant environmental impact will result from the control program. 1/

The February 1985 decision by the State Director was based on an environmental assessment (EA), entitled Idaho Noxious Weed Control Environmental Assessment, 2/ which assessed the environmental impact of three alternative noxious weed control programs and a no-action alternative. BLM stated in the EA that the purpose of the proposed noxious weed control program was to

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1/ By order dated June 5, 1985, the Board granted a motion by the State of Idaho, Camas County, and the Wood River Resource Area Association to intervene in this proceeding and denied a motion by intervenors to place the February 1985 decision of the State Director into full force and effect pending resolution of the appeal, which would lift the automatic stay invoked by 43 CFR 4.21(a). The Director, Office of Hearings and Appeals, by order also dated June 5, 1985, reversed the Board's order in part and granted the intervenors' motion to place the State Director's February 1985 decision into full force and effect to the extent of spraying about 60 acres of "remote BLM-administered lands in four Idaho counties," as described in intervenors' brief. The Director relied on an order, dated July 5, 1984, by the district court in Northwest Coalition for Alternatives to Pesticides (NCAP) v. Block, Civ. No. 83-6272-E (D. Ore.), granting a limited exception to an earlier injunction because of "compelling need," thereby permitting the spraying of herbicides on 40 acres of public land under the jurisdiction of the Forest Service, U.S. Department of Agriculture, in Union County, Oregon, by county authorities. Likewise, the Director concluded that the requested limited exception to the automatic stay, presented a "compelling need" for the spraying of noxious weeds.

2/ Apparently the decision was based on the initial EA dated Jan. 18, 1985. The final EA bears a date of Apr. 8, 1985.

reduce present and future economic losses to ranchers, farmers, and the general public "caused by reduced crop yields, lowered range land productivity, and costly weed control efforts," consistent with State and Federal law. EA at 1. Alternative A proposed the treatment of 8,832 acres of public range land, which would "probably" be limited to 3,000 acres in fiscal year 1985 due to budgetary constraints. Id. at 3. The EA, at 3, stated that, under this alternative, the "majority" of weed control work would be accomplished by county weed control supervisors. The method of weed control employed in any given area would depend on the weed species involved, the location of the infestation, and its proximity to sensitive areas, but the EA stated, at 4, that herbicide spraying "will be the major part of the proposed action," and that spraying "will be considered on all BLM land in Idaho where noxious weeds occur." The proposed herbicides were picloram (Tordon), dicamba (Banvel), glyphosate (Rodeo and Roundup), 2,4-D amine and ester formulations, and amitrole (Amitrol-T). The EA, at 6, 13-17, also proposed, with respect to herbicide spraying, various buffer zones surrounding riparian areas, aquatic resources, and inhabited dwellings, as well as other mitigating measures to "reduce or eliminate" environmental impacts.

In his February 1985 decision, the State Director adopted Alternative A, including the ground and aerial spraying of the herbicides "identified in the proposed action," but limited to the treatment of 3,000 acres of public range land. The State Director stated that the decision would be "effective through 1985," and that "immediate control is necessary to prevent increasing the economic burden on the State, county, and private sectors due to the spread of noxious weeds from public lands into surrounding areas." The State Director noted that the Oregon State Office, BLM, had published a notice of intent in the Federal Register to prepare a regional, programmatic environmental impact statement (EIS) on the use of herbicides on public lands, which "may include Idaho," and that his February 1985 decision might be "modified" in light of information "gained through that EIS effort."

In its statement of reasons for appeal, appellant challenges the State Director's February 1985 decision only to the extent it authorizes the use of herbicides to control noxious weeds. Appellant's principal contention is that BLM failed to undertake a worst case analysis (WCA) pursuant to the relevant regulation at 40 CFR 1502.22, as required in similar circumstances by the court in Southern Oregon Citizens Against Toxic Sprays, Inc. (SOCATS) v. Clark 720 F.2d 1475 (9th Cir. 1983), cert. denied, 105 S. Ct. 446 (1984), and Save Our ecoSystems, Inc. (SOS) v. Clark, 747 F.2d 1240 (9th Cir. 1984), where the possibility exists that the herbicides proposed to be used are carcinogenic at such low levels that usage would have a significant adverse effect on the human environment. Appellant argues the WCA should be prepared in the context of an EIS.

In an answer to appellant's statement of reasons, BLM contends appellant's appeal is effectively "moot[ed]" in part because BLM has decided to "discontinue" the use of amitrole and to delay the decision to use picloram and 2,4-D until finalization of a May 1985 draft EIS, entitled Northwest Area Noxious Weed Control Program, prepared by the Oregon State Office, which includes a draft version of a WCA regarding the impact on human health of the use of picloram and 2,4-D. BLM submits an affidavit, dated June 11, 1985, in

which Larry L. Woodard, the current Idaho State Director, states his intention to discontinue use of amitrole and to delay the decision to use picloram and 2,4-D until preparation of the final EIS. However, Woodard further states that:

> The foregoing does not nor is it intended to rescind or otherwise stay that part of my predecessor's decision allowing the State of Idaho or its political subdivisions to enter public lands administered by the BLM to control noxious weeds as part of their ongoing local programs, which may include the use of 2,4-D, picloram and amitrole. Affidavit, at 3.

BLM also contends it is not required to prepare a WCA concerning the use of glyphosate and dicamba because there is no scientific uncertainty regarding whether these herbicides pose a risk to human health. Counsel for BLM would distinguish conflicting information regarding the carcinogenic effects of a herbicide such as 2,4-D from situations where there is no information regarding the carcinogenic effects of a herbicide. BLM contends that the latter situation applies to glyphosate and dicamba and, thus, no WCA is required.

[1] The applicable regulation, 40 CFR 1502.22, which implements in part of procedural requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4361 (1982), provides that "in evaluating significant adverse effects on the human environment" where "there are gaps in relevant information or scientific uncertainty," an agency is required to disclose the gaps or uncertainty and, under certain circumstances, to prepare a WCA. If information relevant to adverse impacts which is essential to a rational choice among alternatives is not known and the cost of obtaining it is exorbitant or information relevant to adverse impacts which is important to the decision is not known and the means to obtain it are not known

> the agency shall weigh the need for the action against the risk and severity of possible adverse impacts were the action to proceed in the face of uncertainty. If the agency proceeds it shall include a worst case analysis and an indication of the probability or improbability of its occurrence.

40 CFR 1502.22(b).

In SOCATS v. Clark, supra at 1479, the court held that 40 CFR 1502.22 requires the preparation of a WCA in the context of the spraying of herbicides where there is a "possibility that the safe level of dosage for herbicides is low or nonexistent" and enjoined BLM's herbicide spraying program in Oregon pending preparation of that analysis. The court concluded that the potential risk to human health necessitated a WCA, even if the worst case was unlikely. As the court said in SOS v. Clark, supra at 1246: "The duty of an agency is to analyze the costs and environmental effects of the worst case and its costs and then to provide its assessment of the likelihood of the event occurring." (Emphasis in original). Indeed, in SOS, the court rejected as inadequate a WCA prepared in response to SOCATS largely because the analysis had simply failed to address the worst case, i.e., that the herbicides are carcinogenic. As the court said, quoting from the district court opinion

in SOS v. Watt, Civ. No. 83-6090-E (D. Ore. May 6, 1983), at 5, "'Plainly, the worst result that can occur as a result of proceeding in the face of uncertainty as to whether a herbicide causes cancer is that it does cause cancer.'" SOS v. Clark, supra at 1246 (emphasis in original). that "potential" must be addressed in a worst case analysis. Id. The Board has followed these precedents in holding that the use of herbicides in a vegetation management program requires the preparation of a WCA, consistent with the court's decision in SOCATS. Save Our ecoSystems, Inc., 84 IBLA 82 (1984); Sierra Club, 81 IBLA 352 (1984); Save Our ecoSystems, Inc., 81 IBLA 326 (1984).

In the present case, BLM states on appeal that it does not intend to use the herbicide amitrole in its spraying program and that it will defer the decision to use the herbicides 2,4-D and picloram until preparation of the final EIS by the Oregon State Office, which will include a worst case analysis with respect to these latter herbicides, as required by the court in SOCATS v. Clark, supra. In such circumstances, we conclude that the appeal is effectively moot with respect to its opposition to the State Director's February 1985 decision to use amitrole, 2,4-D, and picloram in the noxious weed control program, on the basis of lack of preparation of a WCA, where the State Director has expressed his intention to modify the decision. Accordingly, we will vacate the February 1985 decision to the extent it authorizes the use of 2,4-D, picloram, and amitrole and remand the case to BLM in order that the State Director may reconsider the decision to permit the use of 2,4-D, and picloram after preparation of a WCA.

[2] This leaves the question whether a worst case analysis is required with respect to the spraying of the herbicides glyphosate and dicamba. The State Director's February 1985 decision, as modified in his June 11, 1985, affidavit, continues to authorize the spraying of these herbicides. BLM argues that no WCA is required with respect to glyphosate and dicamba because there is no scientific uncertainty regarding whether these herbicides pose a risk to human health, although the EA discloses there is "no information" on whether they are carcinogenic to humans (EA at 29-30). BLM notes that "studies" have found the herbicides are not carcinogenic to rats and mice (EA at 29-30). Counsel for BLM asserts these herbicides are distinguishable from 2,4-D in that there is neither an allegation by appellant nor disagreement in the scientific community regarding the effects of dicamba and glyphosate on human health.

Pursuant to the relevant regulation, the threshold question in determining whether a WCA is required is whether there are "gaps in relevant information or scientific uncertainty." 40 CFR 1502.22 (emphasis added). 3/ The report in the EA on the effect on humans of the herbicides dicamba and

3/ BLM argues that the absence of information "does not raise the issue of uncertainty, which [it] is necessary to establish before a worst case analysis is required" (Answer at 10). We disagree. Uncertainty is as much the result of the lack of information as conflicting information. In any case, 40 CFR 1502.22(b) requires a WCA where, relevant information, as a result of gaps in such information, is "not known."

glyphosate shows the entry "no information" with respect to the categories of chronic toxicity, teratogenicity, carcinogenicity, and mutagenicity (EA at 29-30, Tables 12 and 13). Thus, there are clearly gaps in the relevant information on the effects of these herbicides. Moreover, we consider information concerning the potential danger to humans from exposure to these herbicides as essential to a "reasoned choice" whether to use the herbicides to control noxious weeds or to use other means. Where the record discloses gaps in relevant information essential to a reasoned choice among alternatives, the agency must weigh the need for the action against the risk and severity of possible adverse impacts by means of a WCA coupled with an indication of the probability or improbability of its occurrence. 40 CFR 1502.22(b). In his February 1985 decision, the State Director addressed the questions of the effect of that decision to permit the use of herbicides on human health:

> The human health effects were addressed based on available information. No unacceptable adverse effects are anticipated with implementation of the decision. The information that could be gained from the incomplete and unavailable data regarding impact analysis would probably not contribute substantially to that information which is known and would probably not change the conclusions. The costs (economic and non-economic) of obtaining that missing data would be exorbitant. [Emphasis added].

This statement presents a justification for the preparation of a WCA with respect to use of the herbicides glyphosate and dicamba where there is, indeed, "missing data," and the costs of obtaining that data are apparently "exorbitant." Preparation of a WCA may not be avoided on the assumption that the information would "probably" not disclose a risk to human health and that, therefore, it is unlikely the herbicides present such a risk. To proceed in the face of uncertainty due to the absence of relevant information where there is a possible risk would be to ignore the dictates of 40 CFR 1502.22(b), which requires that BLM, in such circumstances, consider the worst case that may happen in deciding whether to use the herbicides in the spray program. In setting forth the condition precedent to a WCA, the regulation at 40 CFR 1502.22(b), is concerned not with the probability of the environmental consequences of a proposed action (although there must be some possibility) but, rather, with whether relevant information regarding those consequences is known or unknown and, if unknown, whether it can be obtained. The court in SOS v. Clark, supra at 1245, stated the "mere fact that the possibility of an event occurring is remote or unlikely does not obviate the necessity to do a worst case analysis." As the court concluded in SOCATS v. Clark, supra at 1479, "[w]hen uncertainty exists, it must be exposed," consistent with the intent of NEPA, which is essentially an "environmental full disclosure law," Environmental Defense Fund, Inc. v. Corps of Engineers, 325 F. Supp. 749, 759 (E.D. Ark. 1971). 4/

4/ By "uncertainty," in the context of a WCA, the court meant more than just the fact of uncertainty. Also comprehended were the "'cost[s] of uncertainty -- i.e., the costs of proceeding without more and better information.'" SOCATS v. Clark, supra at 1478 (quoting from Sierra Club v. Sigler, 695 F.2d 957, 970 (5th Cir. 1983). BLM must consider the "range of worst possible effects and the likelihood of these effects occurring." SOS v. Clark, supra at 1244.

Further, we are bound to take notice that Banvel and Roundup (trade names for dicamba and glyphosate) were two of the twelve herbicides in addition to 2,4-D whose application was enjoined by the Ninth Circuit of Appeals pending completion of a WCA. SOS v. Clark, supra at 1242 n.1; SOCATS v. Clark, supra at 1477. The court in SOCATS recited that "The district court found that scientific uncertainty exists as to the safety of the herbicides and held that section 1502.22 applies because the spraying program could have an adverse impact on human health." 720 F.2d at 1473. Again, in SOS v. Clark, supra, the court held that the "issue of whether a WCA is required has been determined by our decision in SOCATS, where we held that the BLM must prepare a worst case analysis bottomed on the assumption that its herbicides are not safe." (Emphasis added.) 747 F.2d at 1244. Accordingly, we cannot find that the holding of SOCATS and SOS is limited to requiring preparation of a WCA for the herbicides 2,4-D and picloram. These precedents are binding on the Department, at least as to cases arising within the Ninth Circuit.

[3] The remaining issue is whether, as reflected in the State Director's June 1985 affidavit, he may permit state and local authorities, consistent with "ongoing local programs," to continue spraying herbicides, including 2,4-D, picloram, and amitrole, on "public lands" pursuant to the February 1985 decision. This decision to allow spraying is in contrast with his statement in the June 1985 affidavit admitting that "the procedural requirements of [NEPA] as interpreted by the courts dictates that before BLM uses 2,4-D or picloram on public lands in Idaho, a worst case analysis must be prepared." Ordinarily, logic dictates, a federal agency ought not be permitted to circumvent the requirement that it prepare a WCA prior to the spraying of herbicides, in circumstances where one is required, merely by allowing other authorities to undertake the spraying.

The legal question presented is whether allowing the State of Idaho or its political subdivisions to enter public lands administered by BLM to control noxious weeds by application of the same herbicides reviewed in the EA constitutes "federal action." Federal action within the meaning of NEPA exists not only when an agency proposes to undertake an action itself, but also may be found where an agency makes a decision which permits action by another party. Thus, the court in Scientists' Institute for Public Information v. Atomic Energy Commission, 481 F.2d 1079 (D.C. Cir. 1973), held:

> [T]here is "Federal action" within the meaning of the statute not only when an agency proposes to build a facility itself, but also whenever an agency makes a decision which permits action by other parties which will affect the quality of the environment. NEPA's impact statement procedure has been held to apply where . . . the federal agency took action affecting the environment in the sense that the agency made a decision which permitted some other party -- private or governmental -- to take action affecting the environment.

481 F.2d at 1088-89 (footnotes omitted). The limits of a finding of federal action based on allowing another party to undertake an action were explored in Defenders of Wildlife v. Andrus, 627 F.2d 1238 (D.C. Cir. 1980), where the court held that "[F]ederal 'approval' of another party's action does not make that action federal unless the federal government undertakes some 'overt act' in furtherance of that other party's project." 627 F.2d at 1244. Holding

that NEPA analysis was not required "every time the agency had power to act but did not do so," 627 F.2d at 1246, the court declined to require the Department of the Interior to bar the killing of wolves on the public lands by State wildlife officials pending preparation of an EIS. 5/

The distinction between these two cases was explored by the court in National Organization for the Reform of Marijuana Laws (NORML) v. U.S. Drug Enforcement Administration (DEA), 545 F. Supp. 981 (D.D.C. 1982). In denying a request to enjoin spraying of the herbicide paraquat on marijuana plants by the state of Florida, the court noted a reluctance to impose NEPA requirements on state action where federal funding was absent and where there was no federal agency issuing permits, approving plans, or giving other "go-ahead" signals. 545 F. Supp. at 984.

Although the EA in this case is lacking in details as to how the herbicide program is to be implemented, the EA states, "The Bureau of Land Management (BLM), is responsible for implementing the proposed weed control program on public land and may do so through cooperative agreements with county weed control districts" (EA at 1). Statutory authority cited for the proposed action and quoted in the EA at Appendix E includes the Act of October 17, 1968, P.L. 90-583, 82 Stat. 1146, and the Federal Noxious Weed Act of 1974, section 9, 7 U.S.C. § 2808 (1982). The former statute authorizes the heads of federal departments to permit state and local weed control officials to enter lands under their control to destroy noxious weeds if such entry is in accordance with a program submitted to and approved by the head of the department. Further, that statute provides for federal reimbursement of state expenses incurred in this effort. Similarly, the Federal Noxious Weed Act of 1974 provides for cooperation of the Security of Agriculture with state and local officials in carrying out measures to control noxious weeds and for federal funding for such actions. Federal Noxious Weed Act of 1974, sections 9 and 11, 7 U.S.C. §§ 2808, 2810 (1982). Accordingly, it appears from the record that the proposed action involves not only BLM approval or go-ahead signals, but also Federal funding. The presence of these two factors distinguish this case from Defenders of Wildlife v. Andrus, supra, and NORML v. DEA, supra, and lead to a conclusion that the proposed action as defined in the EA is federal action requiring a WCA.

Therefore, we conclude the State Director's February 1985 decision, as amended, by the June 11, 1985, affidavit, to the extent it authorizes the spraying of glyphosate and dicamba by BLM and the spraying of other herbicides by state and local authorities under cooperative agreement in the context of the EA must be vacated in the absence of a WCA regarding the environmental impact of the spraying of those herbicides to control

5/ The decisional result in Defenders of Wildlife ultimately turns upon the court's conclusion that the states have traditionally been entrusted with the primary authority over wildlife management, thus divesting the Department of the power to control decisionmaking concerning wild animals under the circumstances found. See Defenders of Wildlife, supra at 1249-50.

noxious weeds. 6/ The case will be remanded to BLM for preparation of a WCA with respect to these herbicides.

Pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated and the case is remanded to BLM for further action consistent herewith.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

Franklin D. Arness
Administrative Judge

6/ The conclusion that a WCA must be prepared does not imply a finding that the use of glyphosate or dicamba, in the context of the herbicide spraying program authorized by the State Director's February 1985 decision, will result in a significant adverse environmental impact, thus necessitating preparation of an EIS, but, rather, merely the conclusion that there is a "possibility of 'significant adverse effects on the human environment,'" thereby necessitating a worst case analysis. SOCATS v. Clark, supra at 1479 (quoting from 40 CFR 1502.22).